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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JOSE LOPEZ and JESUS LOPEZ, Defendants and Appellants.	G040350 (Super. Ct. No. 04CF2780) O P I N I O N

Appeals from judgments of the Superior Court of Orange County, Richard M. King, Judge. Affirmed as modified.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Francisco Jose Lopez.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Jesus Lopez.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In a joint trial, a jury found defendants Francisco Jose Lopez (Francisco) and Jesus Lopez (Jesus) guilty of first degree murder for the killing of Pedro Javier Rosario (count 1; Pen. Code, § 187, subd. (a); all further statutory references are to this code) and street terrorism (count 2; § 186.22, subd. (a)). On count 1 the jury returned true findings of discharging a firearm proximately causing death (§ 12022.53, subds. (d) & (e)(1)), and the crime was committed for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)). As to Francisco, the jury also found he committed the murder to further the activities of a criminal street gang. (§ 190.2, subd. (a)(22).)

The trial court sentenced Francisco to a 50-years-to-life term without the possibility of parole on count 1 and the firearm enhancement, stayed the punishment for the criminal street gang enhancement, and imposed a 2 year concurrent term for street terrorism. Jesus received a prison term of 50 years to life for murder and the firearm enhancement, plus a concurrent 2-year term for street terrorism. Again, the court stayed punishment for the criminal street gang enhancement.

Francisco claims the evidence fails to support the jury's finding he committed the murder with premeditation and deliberation. He also contends the court erroneously denied his request to discharge his attorney during the sentencing hearing and in imposing sentence on count 1. Jesus attacks the jury instructions on his criminal liability as an aider and abettor under the natural and probable consequences doctrine, and claims the court erred by sentencing him to an additional 25-year term for the firearm

enhancement based on a vicarious liability theory. To the extent they apply, each defendant joins in the other's arguments.

We shall modify the sentence imposed on Francisco to life in prison without the possibility of parole. Otherwise, we affirm the judgments.

FACTS

Defendants, both members of a territorial criminal street gang named F Troop, plus three other F Troop members and an individual who belonged to an affiliated street gang, met at a park in the gang's territory. Francisco displayed a handgun and told the others "we have a gun . . . if something happens." The group left the park riding bicycles, followed by a truck carrying several other people.

Initially the group traveled to the home of a fellow F Troop gang member. They then went to an intersection located either in or on the border of an area claimed by a rival street gang named West Myrtle. An eyewitness testified "a minimum of 50" people "on bicycles" and "walking" were around the intersection at the time.

Observing a car driven by Rosario wearing a muscle T-shirt and sporting tattoos, the bicyclists hailed him and surrounded his car when it stopped at a stop sign. Both defendants approached the driver's side window and, while straddling his bicycle, Francisco asked, "Where [are you] from." Rosario said something and slowly began to drive away. Francisco pulled out the handgun, aimed at the vehicle, and, after a couple of seconds, fired the weapon. The bullet shattered the vehicle's back window and struck Rosario in the back of the head, killing him. The bicyclists and truck fled the scene.

DISCUSSION

1. Sufficiency of the Evidence for Premeditation and Deliberation

Citing *People v. Anderson* (1968) 70 Cal.2d 15, Francisco argues the prosecution failed to present evidence of planning activity, i.e., "'what [he] did prior to that actual killing . . . show[ing] that [he] was engaged in activity directed toward and explicable as intended to result in the killing . . . .'" (Italics omitted.) He further claims the fact he did not know Rosario dispels the existence of a motive for the killing and since he let Rosario drive forward before shooting him reflects this was not a sufficiently exacting killing to establish the latter factor. We disagree.

First, we note defendant's summary of the record pays only lip service to the appropriate standard of appellate review. "Substantial evidence is evidence which is '"reasonable in nature, credible, and of solid value."' [Citation.] 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on "'isolated bits of evidence.'" [Citation.]' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Furthermore, the evidence supports the jury's first degree murder verdict against Francisco. Section 189 defines first degree murder to include "any . . . kind of willful, deliberate, and premeditated killing . . . ." The Supreme Court has "defined 'deliberate' as '"formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action [citation]"'" and '"premeditated' as '"considered beforehand."' [Citation.]" (*People v. Memro* (1995)

11 Cal.4th 786, 862-863.) "Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."' [Citation.]" (*Id.* at p. 863.) The "'"three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method,"' [citations]" cited in *People v. Anderson, supra,* 70 Cal.2d 15, "'"are descriptive, not normative[]"'" [citation]" and assist a reviewing court in deciding whether a defendant engaged in the reflection and weighing process for a premeditated killing or merely acted rashly. (*People v. Prince* (2007) 40 Cal.4th 1179, 1253.)

The jury could infer planning activity from the group's park meeting where defendant displayed the gun and mentioned using it "if something happens," and its subsequent simultaneous circling of a vehicle driven by a stranger who appeared to be a gang member at an intersection in or near a rival gang's territory. Motive can be inferred from defendant's query, "Where are you from," which, according to the trial testimony, constitutes a "hit up" in the criminal street gang subculture and likely to lead to violence. The gang expert testified "typically you'll see a hit-up, some sort of, 'Where you from?'" that "more often than not, when two rival gangs cross each other," leads to "some sort of violent act, anywhere from a fist fight to a murder." Louis Perez, the participating F Troop member who testified for the prosecution pursuant to a plea bargain, claimed a "hit-up" is intended to learn "where that person is from," and "if it's an enemy," to "attack that person." Finally, the Supreme Court has recognized "the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder. [Citation.]" (*People v. Memro, supra,* 11 Cal.4th at pp. 863-864.) The manner in which defendant retrieved the gun from his waistband, aimed it at the departing car, and fired the weapon sufficed to justify a finding of a willful, deliberate, and premeditated killing.

Defendant's contention the evidence was subject to a different interpretation merely amounts to a request that we reweigh facts. We conclude the evidence supports the jury's finding Francisco killed Rosario in a willful, deliberate, and premeditated manner.

2. Defendant Jesus Lopez's Vicarious Liability

a. Background

As to defendant Jesus Lopez, the court instructed the jury on the principles of aiding and abetting the intended crime of murder, aiding and abetting the offense of disturbing the peace with Rosario's murder a natural and probable consequence of the target offense, and conspiring to disturb the peace again with the murder a natural and probable consequence of the conspiracy.

Jesus contends the court erred by instructing the jury on the latter two theories in several respects. First, he argues there was insufficient evidence Rosario's murder was the natural and probable consequence of his aiding and abetting or conspiring to disturb the peace. Second, in a supplemental brief, Jesus claims the version of CALCRIM No. 400 given at trial misleadingly told the jury an aider and abettor is "equally guilty" of the crime committed by the perpetrator, and the court's natural and probable consequences doctrine instruction failed to inform the jury he could be convicted of a lesser homicide offense even if it concluded that, as the perpetrator, Francisco was guilty of first degree murder. Finally, he contends even if we affirm his first degree murder conviction the court erred by imposing the 25-years-to-life enhancement under section 12022.53, subdivisions (d) and (e)(1) where his liability was merely vicarious.

b. Sufficiency of the Evidence

Citing *People v. Martinez* (Dec. 16, 2008, B194836), Jesus argues the

evidence failed to support instructing the jury on murder resulting from his aiding and abetting the crime of disturbing the peace. He claims that, at best, the gang expert's testimony "'more often than not,' a 'where are you from?' challenge will be followed by 'some sort of violent encounter' or 'some sort of violent act,' which can include everything from a fistfight up to a murder," established only "murder was a 'possible' result, . . . not . . . that it was a likely result."

We note, subsequent to defendant's filing of his opening brief, the Supreme Court granted review in *Martinez* rendering the Court of Appeal's opinion uncitable. (*People v. Martinez*, review granted Mar. 25, 2009, S170016, review dismissed Aug. 26, 2009.) But, even on its merits, his argument fails.

"[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) The same principle applies under the law of conspiracy for the acts of a coconspirator. (*People v. Hardy* (1992) 2 Cal.4th 86, 188.) "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v. Medina, supra,* 46 Cal.4th at p. 920.) Thus, "'[t]he . . . question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.]" (*Ibid*.)

Prettyman acknowledged it is "[r]arely, if ever, . . . true" "an aider and abettor can 'become liable for the commission of a very serious crime' committed by the aider and abettor's confederate even though 'the target offense contemplated by his aiding and abetting may have been trivial.'" (*People v. Prettyman, supra,* 14 Cal.4th at p. 269.) But cases have upheld convictions for murder or attempted murder where a defendant's liability resulted from aiding and abetting similar minor offenses in the

criminal street gang context. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11 [murder conviction based on aiding and abetting assault involving fistfight]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055 [attempted murder conviction based on aiding and abetting simple assault or breach of the peace during fight with rival gang members]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 [defendant who punched victim before accomplice shot him responsible for murder].)

Defendant argues "the critical question as to foreseeability is the frequency in which 'where are you from?' challenges actually result in murders," and testimony that the expert's claim some violent act will "more often than not" result from a "hit up" "has 'no tendency on its own to prove that a shooting or other potentially lethal conduct is a likely result . . . .'" (Italics omitted.) The Supreme Court's recent decision in *People v. Medina, supra,* 46 Cal.4th 913 undermines this argument.

In *Medina*, the victim visited a house where gang members were attending a party. The defendants asked the victim "'where are you from.'" (*People v. Medina, supra,* 46 Cal.4th at p. 917.) Upon learning the victim belonged to another gang, a fight erupted between him and the gang members. The homeowner broke up the fight and the victim began to drive away. One of the gang members obtained a gun and shot and killed him. A jury convicted the gunman and two other gang members who participated in the fight of first degree murder. The Court of Appeal reversed the latter two defendants' convictions, finding insufficient evidence that the murder was a natural and probable consequence of simple assault.

The Supreme Court reversed the Court of Appeal. "'[A]lthough variations in phrasing are found in decisions addressing the doctrine—"probable and natural," "natural and reasonable," and "reasonably foreseeable"—the ultimate factual question is one of foreseeability.' [Citation.] Thus, '"[a] natural and probable consequence is a foreseeable consequence" . . . .' [Citation.] But 'to be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which

might reasonably have been contemplated is enough . . . .' [Citation.]' [Citation.]" (*People v. Medina, supra,* 46 Cal.4th at p. 920.)

"A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury. [Citations.]" (*People v. Medina, supra,* 46 Cal.4th at p. 920.) On appeal, "[w]e presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. [Citation.] We may reverse for lack of substantial evidence only if '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citation.]" (*People v. Hoang* (2006) 145 Cal.App.4th 264, 275.)

Contrary to Jesus's interpretation of the evidence, the testimony supports the jury's verdict. All of the gang members knew Francisco had a gun and of his intent to use it if necessary. Both defendants and their fellow and affiliated gang members went to an area in or near a rival gang's territory apparently seeking rival gang members to confront. The likelihood of the gun's use when the group "hit up" Rosario, a possible rival gang member, plus the deadly consequences of its use were foreseeable. Under these circumstances, Jesus's conviction for first degree murder as either coconspirator or aider and abettor based on a natural and probable consequences theory is supported by the evidence.

c. Sufficiency of the Instructions on Aider and Abettor Liability

In his supplemental brief, Jesus further contends his "first degree murder conviction must be reversed because the trial court's natural and probable consequences instruction prejudicially failed to advise the jury that he could be found guilty of a lesser included offense even if the jury found the perpetrator committed first degree murder."

In *People v. McCoy* (2001) 25 Cal.4th 1111, a case involving a defendant charged with aiding and abetting the intended crimes of murder and attempted murder,

the Supreme Court held the defendant could be found guilty of a greater homicide-related offense than the perpetrator. *McCoy* reasoned, the general requirement that "every crime ha[ve] two components[,] . . . an act or omission, . . . and . . . a necessary mental state, . . . applies to aiding and abetting liability as well as direct liability." (*Id.* at p. 1117.) Thus, "[a]ider and abettor liability is . . . vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions," but "that person's mental state is her own; she is liable for her mens rea, not the other person's." (*Id.* at p. 1118.) Consequently, "[a]ider and abettor liability is premised on the combined acts of all the principals[]" and "the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Id.* at p. 1120.) Recently, two cases have held *McCoy*'s reasoning supports a conclusion a defendant charged as an aider and abettor of an intended homicide-related offense may be found guilty of a lesser crime than the perpetrator. (*People v. Nero* (2010) 181 Cal.App.4th 504, 513-518 (petn. for review pending, Mar. 8, 2010); *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1164.)

In addition, other cases have held a defendant convicted as an aider and abettor under a natural and probable consequences theory is entitled to have the jury instructed he or she may be found guilty of a lesser crime than the perpetrator of the charged offense. *People v. Woods* (1992) 8 Cal.App.4th 1570 found the trial court erred when it expressly instructed the jury that a defendant charged with first degree murder for an accomplice's intentional shooting of an innocent bystander as they fled from an armed assault and theft could not be found guilty of the lesser crime of second degree murder. After extensively reviewing the history of the common law principle that one who aids and abets another in committing a crime can be found guilty of any reasonably foreseeable offense committed by the person assisted (*id.* at pp. 1581-1586), the court ruled "[w]hile the perpetrator is liable for *all* of his or her criminal acts, the aider and

abettor is liable vicariously only for those crimes committed by the perpetrator which were reasonably foreseeable under the circumstances. Accordingly, an aider and abettor may be found guilty of crimes committed by the perpetrator which are less serious than the gravest offense the perpetrator commits . . . ." (*Id.* at pp. 1586-1587.)

More recently, *People v. Hart* (2009) 176 Cal.App.4th 662 followed *Woods* in a case where two defendants, Hart and Rayford, tried to rob a liquor store during which Hart shot at the store owner. Charged with attempted murder with a willful, deliberate, and premeditated allegation, the court instructed the jury Rayford could be convicted if it found he committed an attempted robbery and attempted murder was the natural and probable consequence of the target crime. While the court also instructed "that, if the jury found the defendant guilty of attempted murder, it must 'decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation[,]'" "[t]he court did not relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction." (*Id.* at p. 670.)

Noting "[a]ttempted premeditated murder is the functional equivalent of a greater offense than attempted unpremeditated murder" (*People v. Hart, supra,* 176 Cal.App.4th at p. 672), the appellate court found "the instruction[s] given to the jury . . . address[ing] attempted murder . . . without mentioning the premeditation and deliberation element of attempted premeditated murder" (*id.* at pp. 672-673) "did not fully inform the jury that, in order to find Rayford guilty of attempted premeditated murder as a natural and probable consequence of attempted robbery, it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery" (*id.* at p. 673).

Here, the court gave the former version of CALCRIM No. 400, stating "a person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." (Italics added.) As noted, case law has

rejected the premise that an aider and abettor cannot be convicted of a lesser offense than the perpetrator. Thus, the "direction that '[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' [citation], while generally correct in all but the most exceptional circumstances, is misleading" in some situations. (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1165.) The court also instructed the jury on the elements of the crimes of first and second degree murder, as well as on the lesser offenses of voluntary manslaughter based on imperfect self-defense, and involuntary manslaughter, but as in *Hart*, it "did not relate the[se] instruction[s] . . . to the natural and probable consequences instruction." (*People v. Hart, supra,* 176 Cal.App.4th at p. 670.)

The question remains whether the aiding and abetting instructions given in this case constituted prejudicial error. *Woods* found the instructional error prejudicial because "[t]he court [expressly] told the jurors they must convict [the defendant] of first degree murder as an aider and abettor or acquit him of any liability for the killing." (*People v. Woods, supra,* 8 Cal.App.4th at p. 1590.) Thus, "[i]n effect, the jury was given an unwarranted all-or-nothing choice with respect to aider and abettor liability for the killing," and "[f]aced with evidence from which it could conclude that only second degree murder was a reasonably foreseeable consequence of [the defendant's] aiding and abetting . . . in [the] assault[s] . . ., but having no option to convict . . . of second degree murder, the jury may have been reluctant to acquit him of the greater offense of first degree murder." (*Ibid*.) *Hart* also found prejudice occurred. Acknowledging the trial court "merely failed to inform the jury that it could convict Rayford of a lesser crime than Hart's crime," it found "[t]he result, however, is the same" because "[t]he jury was left to its own devices without proper guidance concerning the law." (*People v. Hart, supra,* 176 Cal.App.4th at p. 674.)

Hart declared "[e]rror in instructing the jury concerning lesser forms of culpability is reversible unless it can be shown that the jury properly resolved the

question under the instructions, as given. [Citation.]" (*People v. Hart, supra,* 176 Cal.App.4th at p. 673.) But in *Prettyman*, where the natural and probable consequences doctrine instruction failed to identify or describe the potential target offenses, the Supreme Court held the standard of review was "'"whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.]" (*People v. Prettyman, supra,* 14 Cal.4th at p. 272.)

We conclude the latter standard is more appropriate in this context. The trial court instructed the jury that while Jesus could be convicted of murder under the natural probable consequence doctrine, it did not suggest that determination alone would support a finding he was guilty of first degree murder. The trial court further instructed the jury, as to both defendants, on the elements for first and second degree murder, voluntary manslaughter, and involuntary manslaughter. Furthermore, the court also instructed the jury on the criminal street gang enhancement attached to the murder charge and the street terrorism charge, which required the jury to make separate findings on the mental states supporting them.

Furthermore, Jesus relied on an alibi defense at trial. A neighbor testified that on the day of Rosario's murder, Jesus came to his home and played video games with his son. In closing argument, his attorney expressly declined to go through the jury instructions. Rather, he focused on attacking the credibility of the evidence identifying his client as one of the bicyclists, cited the neighbor's testimony, and urged the jury to "find the evidence insufficient to hold Mr. Jesus Lopez accountable for the crime[s]" because "the truth . . . is Jesus Lopez was not there." Counsel did not alternatively contend that, even if Jesus was present when the shooting occurred, he acted with a lesser mens rea than the shooter.

Thus, we find any instructional error concerning the natural and probable consequences doctrine that occurred in this case harmless.

d. Section 12022.53

In relevant part, section 12022.53, subdivision (d) declares "any person who, in the commission of a felony specified in subdivision (a), . . . [including murder] . . . personally and intentionally discharges a firearm and proximately causes . . . death[] to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Subdivision (e)(1) of the statute states, "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [benefit of criminal street gang]. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." Subdivisions (b), (c), and (d) of section 12022.53 relate to the use of a firearm, discharge of a firearm, and discharge of a firearm coupled with great bodily injury or death, respectively.

Jesus contends the trial court also erred by imposing this statute's 25-years-to-life enhancement for personal discharge of a firearm on him. He argues "an aider and abettor is only subject to the subdivisions (d) and (e)(1) enhancement if he or she aids and abets *the offense* that is enumerated within the statute," and because his murder conviction was likely based on the natural and probable consequences doctrine for aiding and abetting the crime of disturbing the peace his "liability for murder was only vicarious," and thus "he was not found to be a principal in [committing] the enumerated offense of murder." This argument lacks merit.

Section 31 declares, "All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." Jesus contends "vicarious liability for the natural and probable consequences of the target crime is not based on section 31," but rather a principle "originating in English common law and embraced by our Supreme Court . . . ." Thus, he argues, there is a "distinction between

liability based on" the natural and probable consequences doctrine "and liability based on aiding and abetting."

Not so. As noted, in *Woods* the Court of Appeal extensively reviewed the history of the natural and probable consequences doctrine. While acknowledging the doctrine originated as "a common law rule of aider and abettor liability which has survived in California" (*People v. Woods, supra,* 8 Cal.App.4th at p. 1583), *Woods* nonetheless concluded "that, in specifying an aider and abettor is liable for 'any crime so committed' by the perpetrator, the Legislature intended—consistent with common law—that the aider and abettor is guilty not only of the criminal act originally contemplated and abetted but also of any other crime by the perpetrator which is a reasonably foreseeable consequence of the offense originally contemplated by the aider and abettor" (*id.* at pp. 1583-1584).

Other courts have also recognized "[a]n aider and abettor's derivative liability for a principal's criminal act has two distinct prongs: First, the aider and abettor is liable for the particular *crime* that to his knowledge his confederates are contemplating. Second, the aider and abettor is also liable for the natural and probable consequences *of any criminal act* he knowingly and intentionally aids and abets, in addition to the specific and particular crime he and his confederates originally contemplated. [¶] This derivative liability of an aider and abettor centers on causation. The law's policy is simply to extend criminal liability to one who knowingly and intentionally encourages, assists, or influences a criminal act of another, if the latter's crime is naturally and probably caused by (i.e., is the natural and probable consequence of) the criminal act so encouraged, assisted, or influenced." (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052-1053; accord *People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1178.)

Criminal liability under the natural and probable consequences doctrine is merely one form of aider and abettor liability under section 31, and Jesus's conviction for murder as an aider and abettor, even if based on a theory he either conspired to commit or

aided and abetted the commission of disturbing the peace rather than murder, still results in a conclusion he was a principal in committing the statutorily enumerated crime of murder under section 12022.53. The trial court thus properly imposed the additional 25-years-to-life term.

3. Defendant Francisco Lopez's Discharge of His Attorney

Francisco was represented by retained counsel at trial. During the sentencing hearing in this case, Francisco announced his desire to "fire [his] lawyer," and "appoint" another lawyer to represent him, claiming they had a "conflict of interest" over counsel's refusal to file a new trial motion. After some discussion, the court denied the request: "I don't find good cause at this time to honor your request. [¶] . . . Unless you give me some facts, . . . the court is going to conclude . . . this is going to disrupt the . . . orderly administration of justice. [¶] We're here at the eleventh hour. . . . [W]e've been in the sentencing [hearing] now for about an hour. I asked the attorney . . . was there any legal cause. There was a wealth of information that was submitted to the court . . . . I have read and considered all of that. The only inference I can draw at this time is that your request is being done to delay the proceedings . . . unless you can give me some facts that show[] . . . otherwise." Francisco again repeated his desire to file a new trial motion. The court then denied his request to discharge counsel and proceeded to sentence the defendants.

Francisco contends this ruling was error, claiming the court improperly imposed on him the burden of showing good cause for the request and the record does not support a showing he sought to delay the proceedings. We disagree.

Courts recognize that, unlike criminal defendants represented by appointed counsel, a defendant represented by retained counsel may discharge his or her lawyer with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983; *People v. Keshishian* (2008) 162 Cal.4th 425, 428.) In *People v. Munoz* (2006) 138 Cal.App.4th 860, we

applied this rule in the context of a criminal defendant's posttrial request to discharge his retained attorney made nine days before his sentencing hearing. The trial court denied the request because there had been no showing of incompetent representation or an irreconcilable conflict.

On appeal, we reversed. "As for the policy considerations underlying *Ortiz*, the Supreme Court said it was concerned with preserving the 'delicate and confidential' relationship that exists between a defendant and his attorney. [Citation.] . . . To our way of thinking, it is every bit as important to guard against these undesirable consequences after trial as it is before trial. . . . [T]he United States Supreme Court has made it clear that '"[t]he right to counsel is not a right confined to representation during the trial on the merits." [Citation.]' [Citation.] Rather, counsel's assistance is considered essential at every critical stage of the criminal process, and this includes post conviction proceedings involving motions for a new trial, sentencing and pronouncement of judgment. [Citations.]" (*People v. Munoz, supra,* 138 Cal.App.4th at pp. 867-868.)

But "[a] nonindigent defendant's right to discharge his retained counsel . . . is not absolute. The trial court, in its discretion, may deny such a motion if discharge . . . is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [Citations.] . . . [T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis . . . .'" (*People v. Ortiz, supra,* 51 Cal.3d at pp. 983-984.)

In *Munoz*, we found the defendant's discharge request was timely, noting the case involved "a two-day trial in which the key witness's testimony had been previously transcribed," and "'[n]o additional public expense or drain on the state's limited resources is at issue . . . .' [Citation.]" (*People v. Munoz, supra,* 138

Cal.App.4th at p. 868.) But we also recognized "[m]ost trials will not be as easily reviewed . . ., so delay and public expense will often be the primary reasons for denying motions to replace counsel post trial. The defendant must always be required to justify this additional expense to the satisfaction of the trial court, and such calls will always be within its broad discretion. Delay and public expense will militate for denial and we do not envision either a spate of such motions or a plethora of successful ones. . . ." (*Ibid.*) Other cases have reached the same conclusion. (*People v. Durham* (1969) 70 Cal.2d 171, 191 [denial of request to relieve retained counsel sought "on the first day of trial" properly denied]; *People v. Lau* (1986) 177 Cal.App.3d 473, 479 [defendant's discharge of counsel "request was made literally the moment jury selection was to begin"].)

That is the case here as well. The trial in this case involved a six-day trial of two jointly charged defendants and it would have taken new counsel quite a bit of time to become familiar with the case and determine whether and on what grounds to seek a new trial. Francisco claimed he wanted to file a new trial motion, but he waited until well into the sentencing hearing to complain about trial counsel's failure to do so and make his discharge request. The good cause mentioned by the trial judge referred to grounds for the late request. Francisco failed to provide any reason for why he literally waited until the eleventh hour and fifty-ninth minute to seek discharge of his attorney and appointment of a new attorney. We find the trial court did not abuse its discretion in denying his request.

4. Defendant Francisco Lopez's Sentence

The trial court sentenced Francisco to "25 years to life on count 1," and a consecutive "25 years to life" for the section 12022.53 firearm enhancement for a "term of 50 years to life . . . without the possibility of parole pursuant to the jury's finding" of "the special circumstance allegation under [section] 190.2[, subdivision] (a)(22)." Francisco's final contention is that this sentence is unauthorized because section 190.2's

"distinct statutory scheme provid[es] the exclusive means of imposing punishment for criminal defendants falling within its provisions." The Attorney General concedes Francisco's argument has merit and we agree. We will therefore order the sentence imposed of Francisco modified accordingly.

DISPOSITION

As to appellant Francisco Jose Lopez, the judgment is modified to provide that on count 1 appellant is sentenced to imprisonment in the state prison for a term of life without the possibility of parole. As so modified the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and send it to the Department of Corrections and Rehabilitation. As to appellant Jesus Lopez the judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.